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No. 83-1539

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICIA C. CARROLL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks damages from three civilian Air Force officials in their personal capacities (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) because they allegedly violated her First Amendment rights when they participated in a decision to reject her application for employment with the Air Force.

1. Petitioner was a civilian employee of the Air Force from July 1974 to May 1976. During part of that time, she was a union steward. In September 1978 she sought reemployment, but her application was rejected. Petitioner's union, on her behalf, then instituted an administrative proceeding under Exec. Order No. 11,491, *reprinted in* 5 U.S.C. 7101 note, which provides that a federal agency shall not "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure,

promotion, or other conditions of employment" (Section 19(a)(2)). Pet. App. 4a.[1]

An administrative law judge found that petitioner had been refused employment because of her prior union activities (Pet. App. 25a-39a). He ordered that petitioner be offered immediate employment and that she be given back pay from the date of the "discriminatory failure to hire" (*id.* at 38a). The ALJ's decision was reviewed by the Federal Labor Relations Authority (FLRA), which upheld the ALJ's findings but ruled that it lacked the authority to order either immediate employment or back pay (*id.* at 20a). The FLRA accordingly ordered that the Air Force give petitioner "first consideration * * * in filling any position for which she may be qualified" (*id.* at 21a).

Petitioner then brought this action in the United States District Court for the Northern District of Texas.[2] The district court dismissed the complaint on the authority of the court of appeals' decision in *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981). Pet. App. 10a-14a. The court of appeals initially reversed (*id.* at 3a-9a) but then granted rehearing and affirmed the dismissal of the complaint (*id.* at 1a-2a) on the basis of this Court's decision in *Bush* v. *Lucas*, No. 81-469 (June 13, 1983). The court of appeals explained (Pet. App. 2a):

> *Bush* v. *Lucas* involved an employee complaining of an adverse personnel action allegedly triggered by public statements by the employee. Administrative remedies were available and were exercised. The instant

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[1]Our citations refer to the repaginated petition served on us on April 27, 1984.

[2]Petitioner initially sued the government as well as the individual respondents in their personal capacites, but the suit against the government was dismissed and petitioner did not appeal.

> case involves a former employee who complains of mistreatment in reemployment because of union activity during the period of employment. A measure of administrative remedies was available and was exercised. We cannot make a principled distinction between [the two cases] * * *.

2. The court of appeals was correct in its conclusion that this case is controlled by *Bush*. Petitioner's claim, like that of the employee in *Bush*, "arise[s] out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States" (*Bush*, slip op. 1). It is therefore "inappropriate * * * to supplement that regulatory scheme with" a *Bivens* remedy (*ibid.*).

Petitioner attempts to distinguish *Bush* in two ways (see Pet. 6). First, she asserts that because she was a disappointed applicant for employment, her remedies were more limited than those of the demoted employee in *Bush*. But petitioner had access to a remedial mechanism parallel to that available to the employee in Bush. She enjoyed the protection of a substantive prohibition against a refusal to hire based on union activity (see *Bush*, slip op. 18, 19); she could invoke an administrative process that provided for an adjudicative hearing and administrative review (see *id.* at 20); and she could have sought judicial review (see *ibid.*), although she apparently did not choose to do so.

The second and more substantial basis petitioner suggests for distinguishing *Bush* is that petitioner, unlike the employee in *Bush*, could not obtain reinstatement and back pay. But *Bush* did not hold that a remedial scheme must provide complete relief in order to preclude a *Bivens* action. On the contrary, the decision in *Bush* was explicitly premised on the assumption that the available remedies were less than complete (see slip op. 5 (footnote omitted)): "We

* * * assume that * * * civil service remedies were not as effective as an individual damages remedy and did not fully compensate [the employee] for the harm he suffered. * * * [W]e assume [that] a federal right has been violated and Congress has provided a less than complete remedy for the wrong."

The only requirements of *Bush* are that the remedial scheme address the wrong in issue and that it provide "meaningful" relief (see slip op. 1, 18, 19). The executive order remedy invoked by petitioner was explicity addressed to the wrong petitioner allegedly suffered, and petitioner received prospective relief. This relief cannot be regarded as less than meaningful merely because petitioner did not receive a compensatory payment of money; by virtue of the government's sovereign immunity and goverment officials' immunity from personal damages liability (see, *e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Barr* v. *Matteo*, 360 U.S 564 (1959)), prospective relief is frequently all that is available to a person claiming to have been wronged by the government.[3]

3. This case does not warrant the Court's review for the additional reason that the remedial scheme established by Exec. Order No. 11,491 and invoked by petitioner has been superseded by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*. The CSRA makes it an unfair labor practice "to encourage or discourage membership in any labor orgainzation by discrimination in connection with hiring, tenure, promotion, or other conditions of

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[3]In addition, prospective relief of the form petitioner received is likely to be particularly effective in deterring wrongs of the kind petitioner alleged; a government personnel manager seeking to discourage union activity will certainly be concerned to avoid a remedial order that constitutes a major symbolic victory for the union and that requires the manager to acknowledge his wrongdoing.

employment" (5 U.S.C. 7116(a)(2)). The CSRA also contains its own remedial mechanism (see 5 U.S.C. 7118) and provides for back pay (see 5 U.S.C. 7118(a)(7)(C) and (D)). Future litigation in this area, therefore, will concern the adequacy of the CSRA remedy, not the executive order remedy invoked by the petitioner. The FLRA, in its opinion in this case, expressly left open the question whether it would have reached the same result under the CSRA (see Pet. App. 20a n. *). Accordingly, it would be premature for the Court to conclude that any question similar to that presented by this case will arise in the future under the CSRA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05